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The Law and Medical Experts, with Particular Reference to the Codes of Criminal Procedure of European Countries

BY

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THE LAW AND MEDICAL EXPERTS, WITH PARTICULAR REFERENCE TO THE CODES OF CRIMINAL PROCEDURE OF EUROPEAN COUNTRIES.*

BY CHARLES GREENE CUMSTON, M.D., BOSTON.

"We find the prisoner not guilty by reason of insanity."
"But the plea was not that of insanity," remarked the Court.
"That is just the point we made," rejoined the foreman. "We decided that any man who didn't have sense enough to know that an insanity plea was the proper caper must be crazy."— *Philadelphia Ledger.*

For some time past the medical and legal professions of Massachusetts have recognized the necessity of revising the present methods of expert medical testimony in civil and penal cases. Several papers have been contributed to this subject of late and have found place in the Boston Medical and Surgical Journal; consequently, for this reason, I shall not refer to them. It occurred to me, however, that, as it is always well to know what others have done and are doing, it might be of interest at the present time to review the laws governing medical expert testimony, particularly in criminal cases, on the Continent.

A recent experience in a criminal court of New York appears to have attracted more than ordinary attention to the unsatisfactory condition of the testimony of medical experts at the present time. This interest is manifest from the fact that the Medical Society of the State of New York, in which more than one half of the profession in that state is enrolled, at a recent meeting appointed a committee to confer with another committee

*Read by invitation before the Massachusetts Medico-Legal Society, June 9, 1908.

from the Bar Association of New York for the purpose of formulating a bill intended to become a law, for the regulation of medical expert testimony in New York state. In an address delivered the latter part of April of this year before the New York Academy of Medicine, ex-Judge Rufus B. Cowing, whose long experience upon the bench, and especially in criminal cases, should entitle his remarks and criticisms to respect, made some suggestions of great value in their bearing upon this important subject.

In the first place, he asserted that much of the just and harsh criticism made against medical expert testimony, which has brought it into both disrespect and disrepute among the people generally, is due to its partisan character, which is invariably made evident from the fact that the expert always gives his opinion in the interest of the party by whom he is summoned and paid. He furthermore pointed out the absurdity of the practice in a trial of permitting a medical expert to play the double part of witness and adviser to the defendant's counsel. In a criminal case where the defense is insanity, it is insisted that a witness should have made a special study of psychology and should be absolutely familiar with the law's definition of insanity. By the law of New York state, a person is not excused from criminal liability as an insane person except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as either not to know the nature and quality of the act he was perpetrating, or not to know that this act was wrong. In order to establish the defense of insanity as an excuse for an otherwise criminal act, it must be shown that the defendant's mind was so diseased at the time of committing the act that he did not have sufficient mental

capacity to form a criminal intent, and did not know that the act which he was perpetrating was wrong.

Judge Cowing declared that the practise of allowing a medical expert to emit his opinion upon an hypothetical case, based upon assumed facts not within his personal knowledge, should not be permitted. Nothing can be more absurd than the usual long-drawn-out hypothetical questions which are based only upon a portion of the evidence, and usually upon that portion only which is most favorable to the party asking the question.

As a rule these questions are both unfair and misleading, and instead of aiding a jury to come to a correct conclusion, they tend to mystify and confuse them to such an extent as often to cause a miscarriage of justice. He also declared that an expert not possessing sufficient ability to personally examine the defendant and ascertain for himself the facts upon which he predicates his opinion should not be allowed to give it. Moreover, the rule regulating the admissibility of the opinions of non-experts or lay witnesses upon the mental condition of a person should be applied only to expert witnesses.

At the meeting at which the address of Judge Cowing was made, the president of the Academy, a member of the committee appointed by the State Medical Society, submitted the conclusions reached, which the committee of the Bar Association would be asked to amend or approve. It embodied the idea that the leading medical organizations of the state shall, through committees appointed, furnish to the Court or Courts in the various counties a list of the names and members of the medical profession in good standing, and of not less than seven years' actual practice, recommended by them as competent and expert

in medicine. From this list the Court may select such expert or experts as in its judgment may be required. Such experts shall be paid out of the treasury of the county a fixed fee, and they may be called by any Court of the state. Testifying as unprejudiced witnesses, employed only by the court, it is evident that their opinion will bear more weight with the Court and the jury than that of an expert paid by a given side for a given service. Such a law enacted would not prevent a person from employing any expert as a witness, but, in view of the fact that little, if any, weight is now given by a jury to the testimony of a witness paid by one or the other side of the trial, such expert testimony would be rarely employed.

In what is to follow it will at once be seen that the bill proposed in New York state for the regulation of expert medical testimony is not unlike the provisions found in the criminal codes of European countries. But, before considering these, I would like to say a few words as to what should be considered the prerogatives and limitations of the medical expert witness in penal cases.

In every question submitted to trial, either of a civil or criminal nature, the Court which must render a sentence has two questions to consider, namely, the evidence and the application of the law. In the first case the Court must reply to the following question: Has it been proven that such and such an act has transpired? In the second case it must, supposing that the reply to the first question is positive, apply the law to the evidence that has been declared actual. Now, although a judge's knowledge of law is, of course, necessary to decide the second question, he has hardly any need, in the first part of his undertak-

ing, of more than applying that judgment with the common sense that the average man possesses to a more or less eminent degree, but which may, perhaps, be more developed in judges on account of their professional attributes.

In order to decide the first question, to know exactly what has transpired, judges have at their disposal certain means of evidence, the laws of which govern the carrying out of this point; that is to say, they have direct or indirect means of discovering the various facts. Among these means of evidence we would first refer to direct evidence, but which should not be considered as actual evidence. There are certain facts that we immediately perceive without any intermediary, while there are others, on the contrary, which are discovered by the intermediary of other facts which have been first brought to light, and by reasoning lead from the known to the unknown. The former constitutes the direct evidence, and it is this which enters in play when, for instance, the police discover the culprits in *flagrante delictu*. The second are matters of evidence, properly speaking; such, for example, as testimony given by witnesses.

There are certain facts which, although submitted directly to the action of our senses, cannot be appreciated unless one is in possession of special knowledge relative to the point which must be verified. Supposing, for example, that the police discover the cadaver of a man whose death occurred suddenly without any witness and under mysterious conditions, or conditions that are absolutely unknown. The Court must be enlightened as to the cause of this death, and the judge does not possess, or is supposed not to possess, the necessary knowledge which would enlighten him as to these causes. Now, just as

one uses optical instruments in order to remedy the imperfection of the eye, the Court also supplements to the insufficiency of its perceptions certain scientific auxiliaries. Under these circumstances, a medical man performs an autopsy on the body and, from his observations, he will deduct his conclusions; thus, the judge increases his understanding by the more refined and trained education of the medico-legal expert. Only, just as the judge should be circumspect as to his own reasonings, the consequences that he deducts from his personal observations, from the impressions that the given affair produces on his own mind, in the same way he should be circumspect of the reasonings and the impressions of his auxiliary, and for this reason it appears to me that the Court should never be obliged to adopt the conclusions of the expert or experts appointed to enlighten it on the question.

It is none the less true that the work of the medical expert is a particular form of evidence, which should not be confounded with other forms of evidence, properly speaking, but it is, in a way, analogous to other forms of evidence because it is based on the supposition of a presumed extraordinary knowledge offered by the physician appointed by the Court to the medico-legal examination.

From this it results that experts enjoy a particular function which should not be confounded either with that of the Court, or, and especially, with that of the other witnesses. The part played by the medical expert should, we believe, have a certain similarity to that of the jury, and like the latter, the expert should be empowered to render his personal judgment upon the question; but this judgment should never be imposed upon the authorities who are to apply the law when

the verdict of the jury definitely decides the question of guilt.

As to the ordinary witnesses, they should differ totally from the medical experts, although in the courts of the United States there is no difference. It is the opportunity alone which creates the witness, namely, his fortuitous presence on the spot at the time of the crime; or, on the other hand, it may be his relations with the accused which necessitate his presence on the witness stand in order to relate what he may know directly or indirectly about the case. But the witness should only have a single duty, and that is to state what he has seen or heard, and he should not be asked to emit any thoughts that were suggested to him from what he saw or to offer any conclusions that he may have drawn therefrom. In other words, he should not have the right to emit any judgment on his own part.

The expert, on the contrary, does not go about his mission from circumstances or chance, because, in a large majority of instances, his cognizance of the affair only results by his appointment to proceed as an expert; this mission is confided to him on account of his special knowledge and the power that this gives him to enlighten certain points which, without him, would remain obscure. The expert should then be the object of a choice, and his mission is twofold; it is not limited to the discovering of circumstances that the Court would be unable to discern itself, and the expert should also give his appreciation of facts and draw conclusions from the knowledge he obtains from his capacity as expert. He should give his personal opinion to the authorities and in this way he passes a judgment in every sense of the word.

From what I have said I do not wish to impart the idea that experts should exercise the functions

of a judge. If, in all conscientiousness, they render a judgment on the case because they have solved some or all of the difficulties which are submitted to them, this judgment, from the point of view of law, should merely have the character and the strength of a simple opinion. Without doubt this opinion, being given by men who are well educated and have specialized themselves in certain branches of medical science, should have considerable authority, because from the fact of the special knowledge of the expert the Court should be guided by his opinion on matters which it is impossible for it to pass upon. However, the Court should be always free to act, and it is the duty of the judge to carefully examine and to discuss the results obtained by the expert and use the best judgment in his power in the control of the conclusions rendered by the expert; and what is still more, in my way of thinking, the Court should not be obliged to abide by the opinion of the first expert if there is any doubt as to the latter's opinion.

Medical expert work in criminal matters does not differ in its object from that in civil procedures. Both have the same end in view, namely, to enlighten the judge on points which would otherwise remain obscure. As human knowledge has become extended, both the Courts and the medical profession have been obliged to become more and more specialized in certain branches. Each day the horizon of the medical art broadens, and as human intelligence is not infinite, it is necessary to restrain one's scope and only cover a lesser territory, if the latter is to be thoroughly explored. Consequently, science in general has become divided up into a number of subdivisions. A few centuries ago the practice of medicine was represented by the physician and

the chemist; to-day it is divided among surgeons, physicians, accoucheurs, neurologists, etc., and consequently one should have recourse to these various specialists as experts in the various branches of medicine.

On the other hand, as each branch of science becomes more developed and complete, one should be more rigorous and more particular in the selection of an expert. A Court which formerly would have been satisfied with the personal opinion of an expert in a given case is to-day far more severe. Knowing that certain physicians have given special attention to a given question, the Court naturally should consider them more competent in the matter, and, therefore, it is to them that the expert evidence should be confided. Then, again, these examinations, while becoming more numerous and complicated, at the same time become more exact. Consequently, at the present time, particularly in criminal cases, the law has in its hands an instrument which each day becomes more perfected and which should result in a decrease of the occurrence of judicial errors.

If I am rightly informed, the laws governing medical expert testimony in France that are at the present time in force are represented by the text adopted by the Chamber of Deputies in 1898 and are divided into eleven articles, the last two of which I will not give, as they merely concern the salary, etc., of the expert witness.

The French law is as follows:

"ARTICLE 1. The list of experts allowed to practise their art in criminal and correctional matter is to be made out each year for the following year by the Courts of Appeal, etc. . . . The experts are classified into categories on this list, which only include members who from their

special knowledge rightfully belonging to them, with the exception of those which are referred to in Article 2.

" ART. 2. The list of physicians and chemists admitted to the practice of medico-legal expert work for the courts is made up each year for the following year by the Courts of Appeal, the Procureur Général heard on the proposition of the civil courts, the faculties and schools of medicine, pharmacy and science. The professors and other members giving lectures in the said faculties, the physicians, surgeons, accoucheurs and chemists of the hospitals in cities where the faculties or schools of medicine exist, the physicians of hospitals and public asylums for the insane, and members of the Academy of Medicine will, from their appointments, be placed on this list; they will, as far as possible, be classed in groups according to their specialty.

" ART. 3. The examining judge, or the officer designated to take his place, appoints from the annual list, made up in conformity to the preceding articles, one or several experts if it is necessary to undertake distinct scientific researches. The selection of the expert or experts is immediately communicated to the defense, who has a right to choose on the annual list which is submitted to him an equal number of experts. This choice of experts should be made within three days from the time that the notification is made to the defense. In the case where the defense has not replied within this lapse of time, the judge appoints a second expert, as is stated in Article 5. When there is urgency in proceeding to the expert examination, and this is ordered by the President of the Court of Assizes, the defense may at once avail himself of his right to select an expert if he so desires. If there are several accused in the case,

they should decide together in order to make their appointment of experts.

"ART. 4. The experts designated in paragraph 2 of Article 2 can only be selected if this measure, which must be justified by the gravity of the affair, is authorized by a decree from motive on the part of the President of the Court or the President of the Jurisdiction. The aforesaid decrees are not subject to any appeal.

"ART. 5. If the author of the crime is unknown, or if the criminal has escaped, the expert work ordered by the examining judge should be confided to at least two experts, selected from the annual list.

"ART. 6. A single expert cannot proceed with his work excepting when the criminal formally renounces a contradictory expert testimony and accepts the expert appointed by the examining judge.

"ART. 7. The experts appointed by the examining judge and the defense enjoy the same rights and prerogatives. They proceed together in all the technical operations, and their conclusions are written in a common report after having contradictorily discussed them.

"ART. 8. If the experts are of divided opinion, they are to designate a new expert who should give the casting vote. If a final conclusion is still lacking, the appointment of the expert is made by the President of the Court or by the President of the Jurisdiction.

"ART. 9. In spite of the terms of the preceding articles, the procureur of the Republic and the examining magistrate may, in cases of extreme urgency, especially if they have gone to the place of crime in order to catch the culprits *in flagrante delictu*, or if the evidence and proofs of the crime are on the point of disappearing, appoint provi-

sionally a physician whose name is not upon the annual list. This provisory expert will proceed with the expert work and, if necessary, preserve the articles to be submitted for expert examination, and he shall make out a summary report, which, after having been approved by the examining magistrate or the procureur of the Republic, shall be transmitted with all the other documents to the experts, who shall at once be designated in conformity to the rules laid down in the above articles, unless the first examination has been considered sufficient by common agreement between the examining magistrate and the defense."

As will be seen, the French courts have their own appointed experts, these being made annually and, at the same time, the defense has also the right to select his own experts, but they must be taken from the list submitted to him by the Court. Although the law governing the medical experts in France is by no means perfect, and some changes are greatly wished for there, nevertheless the practice of expert work, even as it is in France, seems to me greatly superior to the methods employed in the various states in the Union and in England. Among the legislations of Europe who have more or less directly undergone the influence of the French Code, some have remained faithful to the principles laid down by the legislators of 1808, while others have gone beyond France in their work at perfecting their laws and, under the domain of new pre-occupations, these have undergone more or less radical changes concerning the defense, especially during the collecting of evidence in the case. Contradictory expert work is not permitted in Italy, nor in the Code of Neuchâtel of 1893. In Italy, the defense may call experts at the time of the trial,

but, during the collecting of evidence, he cannot interfere. In the same way, at Neuchâtel, it is the Court who appoints one or several experts as it may see fit. The defense cannot interfere with the expert work any more than he can in any of the other processes in the collecting of evidence. Only the system inaugurated in 1875 is kept up, which consists in an intervention on the part of the defense, before the close of the collecting of evidence, and his permission to offer new evidence. Likewise, there is no question of representation of the defense as far as medical expert testimony is concerned, either in Bâle-Ville, or in the cantons of Geneva and Vaud.

The Austrian Code of 1873 does not allow contradictory expert work. In principle, this is done by two experts, and by only one if the case is unimportant. The choice of the experts is left to the examining judge, but the latter should give preference to experts chosen by the Courts, excepting under certain circumstances. The judge gives notice of his choice to the prosecution and the defense in order that they may object if they have any motives for so doing. The judge may order a new expert examination by other physicians if the first report appears to be obscure to him. If, in his opinion, the obscurity is due to any fault on the part of the experts, or if their conclusions do not appear to him correctly deducted, he may choose others. And, lastly, if the expert examination relates to a point of medicine or of chemistry, he may seek the advice of one of the faculties of medicine existing in those countries represented by the Reichsrath.

The defense has no right to intervene in the expert work, and the only acts in the collecting of evidence in which the defense may assist is the perquisition at the domicile and the perquisition

of papers. Consequently, not only has the defense no right to be represented by an expert, but his lawyer or lawyers also have no right to intervene during the expert examinations.

In Belgium, the criminal code reproduces almost entirely what is found in the French Code. Contradictory expert examination is very ardently wished for, and de Ryckère, military auditor, has asked for a change in the law whereby two experts shall be appointed, one by the Court and the other by the defense, and that their conclusions should be given in common after a discussion between the two experts. This system has also its opponents, and among these is Dr. Lebrun, a medical expert of Brussels. He, however, desires certain reforms; among others, the complete reorganization of the teaching of legal medicine and the formation of a high medico-legal committee, which shall be the sovereign judge in medico-legal questions.

The principles of the French Code of criminal procedure have, however, been given up on one point. This exception results from the law of April 20, 1874, relative to preventive detention. According to Article 25, no corporal examination can be ordered, other than in cases of *flagrante delictu*, if it is not ordered by the Council Chamber, the Chamber of Accusations or by the Court in which the case is being reviewed. The defense may, at his expense, select a physician to be present at the examination of the experts. It would appear, however, according to a Belgium expert, Dr. Vleminxq, that this absolute right allowed the defense of choosing his expert to represent him at the trial has not given any very brilliant results, because, after the lapse of three years, this system ended in a very disagreeable confusion.

The German criminal code of 1877 contains detailed orders relative to expert examinations. The judge appoints the experts and designates the number. He can only select the officially appointed experts, excepting in exceptional cases. During the collecting of evidence the judge decides whether or not the experts shall give their opinion verbally or in writing. He also decides whether another expert examination shall be made in the case where he finds the first is insufficient, and in very serious affairs, or if the experts do not agree among themselves, he may consult the authorities officially appointed for special cases.

The defense cannot intervene in the expert examination. He may demand that those experts that he has the intention of calling at the trial be summoned to appear the day of the expert examination. If the judge rejects this request, the defense may summon them at his own expense. But the same article of the Code gives a very serious restriction to this right. The experts of the defense, it says, may assist at the expert examination "*unless their presence is of a nature to hinder the work of the officially appointed experts.*"

Beside this right given to the defense to be represented at the expert examination by his own experts, the German Code, under certain circumstances, allows the defense to assist himself at certain expert hearings or operations, this right having no restrictive clause such as the one mentioned above. This instance is indicated in Article 191 of the Code and is admissable when it is supposed that the expert or the witness cannot appear during the trial, or when his appearance would be a matter of particular difficulty on account of the distance of his residence from the place of trial.

During the trial the defense may summon his experts, but the President of the Court has a right to refuse him this privilege. Both sides and the judges are privileged to ask questions. The opinion of the experts may be read, and if this opinion emanates from some special authority in the matter, the Court may request this authority to delegate one of its members in order to uphold its opinion during the trial. This is found in Article 255.

It may consequently be seen that in Germany there is no contradictory expert witness, properly speaking. Without any doubt the defense may have the experts, appointed by the judge, observed during their operations by his experts, but the judge can always prevent the application of this law on account of the last paragraph of Article 193 of the Criminal Code.

Strange as it may appear, the most liberal legislations relative to the defense are to be found in the Code of Penal Procedure of the Argentine Republic and the Spanish Code of Sept. 14, 1882. According to the Code of the Argentine Republic, the defense may always be represented during the collecting of evidence and make their own observations, only his representatives must withdraw when the official experts discuss their findings.

The Spanish Code includes a system which is very similar to that advocated some ten years ago in France, by Cruppi. It, however, differs in two important points, namely, the defense is obliged to pay the cost of the appointment of his experts and only has the privilege of selecting one, while the Court may appoint several. Besides these two points, the Spanish Code presents many other interesting questions. For example, the question of expert examination is treated quite

completely. Every piece of expert work, according to Article 459, must be performed by two experts, but exception is made in the case where one of the experts resides in a locality where it is impossible for him to summon a second expert without great inconvenience. This exception is similar to that made in the German and Austrian codes.

The appointment of the experts is made known to the prosecution and the defense every time that it is possible. This is found in Article 466. In every instance when the expert work cannot be given at the preliminary hearing, the prosecution has the right to appoint an expert who will be present at the expert operations, and the same right belongs to the defense. If the defense is composed of several persons, they must arrange among themselves for the selection of the expert (Article 471). Article 356 relative to expert chemical work shows how this examination should be conducted. It states that the defense has the privilege of appointing one expert who will work in conjunction with those appointed by the judge.

If the experts do not agree, and if their number is even, the judge shall appoint another. The expert operations which have already been performed should then be repeated if it is possible and any other new ones considered proper will be undertaken with the newly appointed expert. If the repetition of the first expert work and the performance of new expert operations are not possible, the newly appointed expert will simply deliberate with the others on the results already obtained and will formulate his conclusions with the expert or experts whose opinion he adopts, or he will render his conclusions separately if his opinion differs from the others.

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